Supreme Court, U.S.
FILED
APR 21 1984
ALEXANDER L. STEVAS
CLERK

83-1717

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALABAMA SURFACE MINING RECLAMATION COMMISSION,

Petitioner

V.

COMMERCIAL STANDARD INSURANCE COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO ALABAMA SUPREME COURT

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ATTORNEY GENERAL OF
ALABAMA

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Counsel of Record

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ATTORNEYS FOR
PETITIONER

QUESTIONS PRESENTED

1. Is the Alabama Courts' decision in this case so unusual and improper as to unnecessarily obstruct the purpose of federal law, to "protect the society and the environment from the adverse effects of surface coal mining operations"? 30 U.S.C. §1202(a).

2. Does the Alabama Courts' decision violate federal law in its restrictive interpretation of the statute in question?

a. Should the failure to timely commence one verified complaint proceeding for one particular violation against a surface coal mine operator operate to relieve the operator and his surety from all requirements of the Alabama Surface Mining Act of 1975?

b. Is the Alabama Surface Mining Commission without jurisdiction to carry out its federally mandated responsibility and act upon any violations of the surface mining laws unless a verified complaint is filed within nine months of the cessation of mining activity?

PARTIES

The caption contains the names of all parties to the proceeding in the court below.

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OPINIONS BELOW

1. The opinion of the Alabama Court of Civil Appeals is reported as Commercial Standard Insurance Company v. Alabama Surface Mining Reclamation Commission, 443 So. 2d 1245 (Ala. Civ. App. 1983), and is reproduced as Appendix C, hereto, pp. 3a, infra.

2. The opinion of the Tuscaloosa County Circuit Court of Alabama is reproduced as Appendix D, hereto, pp.17a infra.

3. The opinion of the Alabama Surface Mining Reclamation Commission is reproduced as Appendix E, hereto, pp. 24a infra.

JURISDICTION

The judgment of the Alabama Court of Civil Appeals was entered September 14, 1983. See Appendix C, hereto, pp. 3a infra.

Petitioner's timely application for rehearing was denied in an order entered October 19, 1983. See Appendix B, hereto pp. 2a infra.

Petitioner's timely application for certiorari to the Alabama Supreme Court was denied in an order entered January 27, 1984. See Appendix A, hereto, pp. 1a infra.

This petition is filed within ninety days of that denial, as permitted by Rule 20.2, 28 U.S.C. §2101(c). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) which provides for

review of a final judgment rendered by the highest court of a state in which a decision could be had where the validity of a statute of the United States is drawn into question or any right is specially set up or claimed under a United States statute. See Appendix F, hereto, pp. 39a infra.

FEDERAL QUESTIONS

The precise issues litigated at the state court level involved interpretation of enforcement provisions of the state act. These were the provisions relied on by Congress to safeguard the rights created by federal law. While the case involves the interpretation of state law provisions the overriding issues center on the enforcement of federally created rights making federal questions manifest at every stage of the proceeding herein.

The federal act was enacted to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations", to "assist the States in developing and implementing a program

to achieve" those purposes; and "wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations". 30 U.S. C. §1202(a), (g)(m).

Congress specifically declared that the protection of the environment from the adverse effects of coal surface mining was a federal problem. "(S)urface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner". Congress further found that "the cooperative effort established by this Act is necessary to prevent or mitigate adverse environmental effects

of present and future surface coal mining operations". 30 U.S.C. §1201(j), (k).

The federal act imposes mandatory incorporation of federal standards that protect federal rights into state law. Enforcement of a federal right-protection from the adverse effects of surface coal mining operations-has been entrusted to those states with approved regulatory programs. Congress has defined the evil, prescribed the remedy, but allowed the states to administer the "medicine" through implementation of a consistent state statutory scheme.

Where a federal act imposes mandatory incorporation of federal standards into state law and compels the state to enforce federal rights any litigation arising under such state law must necessarily present federal questions.

Whenever federally created rights are at stake, federal questions must necessarily be involved.

At issue in the present case is whether the state can continue to enforce crucial provisions of the state act which directly affects the ability of the state to protect the federal rights it is charged with enforcing. The action herein involves federal rights granted by a federal statute. Litigation of these issues necessarily involves federal questions in that their resolution hinges on the interpretation of a state statute that enforces federally created remedies. The questions litigated in the state courts below are necessarily federal questions in that their resolution will affect federally created rights and remedies.

The state statute draws its authority from the federal act and must be construed in light of the purposes and remedies declared in the federal act. As such, a federal question is implicit in any action involving an interpretation of such a state statute or a part thereof.

STATEMENT OF THE CASE

On January 12, 1981, Frank Evans and Bob Cleere, Inspectors for the Alabama Surface Mining Reclamation Commission (hereinafter the Commission) filed verified complaints with the Commission alleging violations of the Alabama Surface Mining Reclamation Act of 1975 (hereinafter the State Act), by Hendrix and Lee, Inc., a surface coal mining licensee subject to regulation by the Commission. On the same date, the Director of the Commission issued Citations and Orders to Hendrix and Lee, Inc. Copies were sent to the surety on Hendrix and Lee's reclamation bonds, Commercial Standard Insurance Company, Inc. (hereinafter Commercial Standard), the Appellant.

On January 27, 1981, the Commission

held administrative hearings, addressing the violations against Hendrix and Lee. At the hearing, no one appeared on behalf of Hendrix and Lee, Inc. However, Commercial Standard was represented by counsel. Based upon the failure of any representative of Hendrix and Lee, Inc. to appear, the hearing examiner found that the allegations as to violations of the State Act were admitted. Counsel for Commercial Standard was not allowed to participate in the hearing other than to the extent of objecting on the record that the hearing violated the due process rights of Commercial Standard, and that the Commission had no jurisdiction in the matter due to the fact that the complaints were not filed within the time required by §9-16-41(a) Ala. Code (1975), (hereinafter cited by section number).

On March 12, 1981, the Director issued an order which required Hendrix and Lee, Inc. or any other interested party to file a reclamation timetable within sixty days of the date of the Commission's order outlining the steps to complete reclamation of the affected areas by May 15, 1982. Commercial Standard, as surety, was granted an additional thirty days to file such a timetable. It was further ordered that the failure to file a reclamation timetable within the time limits allowed would result in the surety bonds being declared forfeited and being due and payable to the State. Neither Commercial Standard nor Hendrix and Lee, Inc. submitted a timetable.

Commercial Standard filed a consolidated appeal of the Commission's orders

to the Circuit Court of Jefferson County, Alabama. The case was transferred to the Tuscaloosa County Circuit Court which entered an order affirming the orders of the Commission.

Commercial Standard appealed to the Court of Civil Appeals which on September 14, 1983 reversed and remanded the decision of the Circuit Court holding that the surety was due to be discharged from its obligation on the bonds in the instances complained of and that the orders of the Commission were void and to no effect on the basis that the verified complaints on which the actions were based were not filed within ninety days of the event or events giving rise to the violations complained of as required by the Act.

The Commission's application for

rehearing was overruled without opinion on October 19, 1983. The petition for writ of certiorari to the Court of Civil Appeals was denied without opinion by the Supreme Court of Alabama on January 27, 1984.

REASONS FOR GRANTING THE WRIT

The mandate of federal law, the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 et seq. (hereinafter the federal act), is to insure that all lands surface mined within the United States be reclaimed. 30 U.S.C. §1202(e).

The federal act initiated a scheme whereby the states would enforce the federally mandated surface mining laws through state procedure. 30 U.S.C. §1253.

The federal act established the right of the people to be free from the adverse effects of surface coal mining operations, 30 U.S.C. §1202 (a). However protection of these rights was entrusted to the states. "(T)he primary governmental responsibility for developing, authorizing, issuing, and

enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States". 30 U.S.C. §1201(f). The purpose of the Alabama act is to safeguard these federal rights by establishing and enforcing a regulatory scheme that is uniquely suited to the surface coal mining industry of the state. While the instant case involves a challenge to state regulatory statutes, in actuality it is federally created rights that are endangered. The decision as it now stands, frustrates the will of Congress by eviscerating the state remedy that was implemented to carry out the purposes of the federal act.

It was argued in Petitioner's application for writ of certiorari to the Alabama Supreme Court that the Alabama Court of Civil Appeals erred in the result that

was reached. That result obstructs the purpose and design of the federal act by placing a very restrictive interpretation on the State statute which implements the federal law.

The State law contains a provision that complaints brought by the Commission must be filed within ninety days from the event or events giving rise to the complaint. Ala. Code §9-16-51(a). Further, there is a requirement that grading and contouring of surface coal mined lands be accomplished by the operator within six months from the date of completion of mining operations. Ala. Code §9-16-39(g). The Court of Civil Appeals determined that since the Commission had not filed one particular complaint within ninety days from that six month period that the surety company is automatically

discharged. Commercial Standard, supra.

This reasoning completely obliterates the Commission's opportunity to file additional complaints for other violations of law for which the surety would be responsible.

The failure to file a timely complaint does not excuse performance of the reclamation obligation and does not work a discharge of the surety under its bond. The verified complaint procedure is a mechanism for enforcing specific provisions of the State Act against recalcitrant operators. It is a mechanism to insure that the requirements of the State Act are complied with. The verified complaint applies to "operators" under the State Act only. Ala. Code §9-16-51. Ala. Code §9-16-31 defines an "operator" as "the person, firm, cor-

poration, partnership or other entity conducting coal surface mining". Ala. Code §9-16-51 has no application to a surety on an operator's bond. The procedure was never intended to provide either an operator or a surety with an excuse for nonperformance of their respective obligations under the State Act.

If a verified complaint is untimely filed, the result is that no proceedings may be had upon the specific violations alleged in the complaint. It does not mean that the operator is discharged from his reclamation responsibilities under the State Act. The obligations to reclaim are separate and apart from the potential liability of the operator for violating specific provisions of the State Act and the obligation to reclaim is not dependent upon a verified complaint

being initiated to compel reclamation.

The ninety day rule for filing a verified complaint of Ala. Code §9-16-51 (a) has no application to the validity of the suretyship contract. The contract of suretyship is conditioned, both in express terms of the contract and the language of the Act, upon performance of the reclamation obligations imposed by the State Act. §9-16-44(a).

The result reached by the Alabama Court is directly opposite to the only other decision that has considered the issues. In American Casualty Co. v. Commonwealth, 441 A. 2d 1383 (Pa. 1982) the Pennsylvania Commonwealth Court was asked to construe a statute requiring that bond forfeiture actions be commenced within five years of the cessation of mining. The court found that reclamation

was a part of the mining process and that an action on the bond would lie if brought within five years following the completion of reclamation. American Casualty, supra at 1387.

The effect of the restrictive opinion of the Alabama Court of Civil Appeals is to obstruct the intent and purpose of the federal act. The restrictive opinion is also contrary to the surety law. The rule has developed that a contract of suretyship is to be liberally construed in favor of the obligee and against the commercial surety. National Surety Co. v. First National Bank, 224 Ala. 423, 140 So. 544 (1932).

As was argued by Petitioner in its brief to the Supreme Court of Alabama "discharging of a surety on its bonds

because a verified complaint was not timely filed against an operator stands the Reclamation Act on its head and places the monetary gain of a commercial insurer above the protection of the environment and natural resources of the citizens of this State".

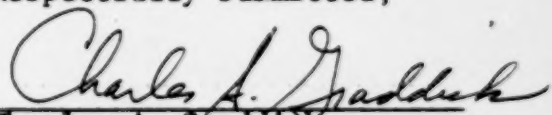
Allowing the state court decision herein to stand will result in the very evil that the federal act was enacted to guard against, namely "destroying or diminishing the utility of land...by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water and other natural resources". 30 U.S.C. §1201(c).

The Alabama Courts' opinion is contrary to applicable law, inconsistent with opinions of other state courts and obstructs the intent of the federal act.

CONCLUSION

This Court should grant certiorari in this case as it involves important federal questions which materially affect the well-being of the people of the United States.

Respectfully submitted,



Charles A. Graddick
Alabama Attorney General

Assistant Alabama Attorney General

CERTIFICATE OF SERVICE

I, Rosa H. Davis , a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 20th day of April, 1984, I did serve copies of this petition and the accompanying appendix on Respondent, by placing in the United States Mail, first class, postage prepaid, three copies properly addressed to the counsel of record for Respondent, as follows:

Honorable Thomas L. Stewart
Gorham, Waldrep, Stewart & Kendrick
1507 City Federal Building
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83-1717

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OCTOBER TERM, 1983

ALABAMA SURFACE MINING RECLAMATION COMMISSION,

Petitioner

v.

COMMERCIAL STANDARD INSURANCE COMPANY,

Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

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ATTORNEY GENERAL OF
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C	3a	September 14, 1983 Alabama Court of Civil Appeals (Appeals Opinion)
D	17a	Tuscaloosa County Circuit Court (Order)
E	24a	Alabama Surface Mining Reclamation Commission (Findings and Order)
F	31a	Text of statutes cited

APPENDIX A

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1983-84

RE: 83-150

EX PARTE: ALABAMA SURFACE MINING RECLAMATION COMMISSION

RE: COMMERCIAL STANDARD INSURANCE COMPANY

VS.

ALABAMA SURFACE MINING RECLAMATION COMMISSION

Petition for Writ of Certiorari denied. No opinion. January 27, 1984

ADAMS, J. TORBERT, C.J., FAULKNER, ALMON & EMBRY, J. J., CONCUR.

Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX B

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS OF ALABAMA

OCTOBER TERM, 1983-84

RE: CIV. 3806

RE: COMMERCIAL STANDARD INSURANCE COMPANY

VS.

ALABAMA SURFACE MINING RECLAMATION COMMISSION

Application for rehearing overruled. No opinion on rehearing. October 19, 1983.

John H. Wilkerson, Jr., Clerk, Court of Civil Appeals of Alabama

John H. Wilkerson, Jr.
Clerk, Court of Civil
Appeals of Alabama

APPENDIX C

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS OF ALABAMA

OCTOBER TERM 1983-84

RE: CIV. 3806

RE: COMMERCIAL STANDARD INSURANCE COMPANY

VS.

ALABAMA SURFACE MINING RECLAMATION COMMISSION

SEPTEMBER 14, 1983

Wright, Presiding Judge

This is an action under the Alabama Surface Mining Reclamation Act of 1975, appealed from the Circuit Court of Tuscaloosa County, Alabama.

On January 12, 1981, verified complaints were filed with the Alabama Surface Mining Reclamation Commission

(herein the Commission) against Hendrix & Lee, Inc. (herein Hendrix), a company which had previously been engaged in surface mining in Tuscaloosa County, Alabama. The complaints alleged violations of the Alabama Surface Mining Reclamation Act of 1975 by Hendrix.

A hearing was held January 27, 1981, by a hearing examiner. Notice of the hearing was sent to appellant, Commercial Standard Insurance Company (herein Commercial), the surety on the reclamation bonds of Hendrix for the affected mined area. Commercial appeared by counsel at the hearing.

No one appeared at the hearing on behalf of Hendrix which, prior to the issuance of the complaint, had filed a Chapter 7 petition in bankruptcy court. No testimony was taken at the hearing as

the examiner determined that all the facts delineated in the verified complaints were admitted by Hendrix, due to its failure to appear.

Counsel for Commercial requested the right to present evidence, subpoena witnesses, and cross examine the inspectors who filed the complaint. That request was denied. However, the examiner allowed Commercial to object on the record that its constitutional rights to due process and equal protection were being violated, and that the examiner had no jurisdiction under §9-16-15(a), Code of Alabama 1975.

Subsequently, the examiner issued an order stating that Hendrix, or any other party with an interest, should submit a reclamation timetable to the Commission. Failing to receive any

timetables, the Commission ordered the forfeiture of the surety bonds.

Commercial appealed the order to the Jefferson County Circuit Court, pursuant to §9-16-51(b), Code of Alabama 1975. The case was transferred to Tuscaloosa County Circuit Court. In April 1983, the Circuit Court of Tuscaloosa County, after hearing, entered judgment in favor of the Commission. Commercial appealed.

Three issues were raised on appeal: (1) lack of proper jurisdiction under §9-16-51(a), Code 1975, (2) release of surety due to a material alteration of the original obligation, and (3) deprivation of Commercial's federal constitutional rights of due process and equal protection when not allowed to participate in the hearing before the Commission.

In resolving the jurisdictional issue it should be noted that the Alabama Surface Mining Reclamation Act of 1975 has been repealed by Act No. 81-435, Acts of Alabama 1981, §38. The 1975 act is applicable in this case, however, because it was in effect at the time the cause of action occurred.

Section 9-16-51(a) states in pertinent part that, "Complaints alleging a violation of the articles or rules or regulations of the Commission must, as a jurisdictional matter, be filed with the Commission within 90 days of the event or events giving rise to such complaint". This court has already held the section required as a jurisdictional matter that a verified complaint must be filed within ninety days. Alabama Surface Mining Reclamation Commission v.

Jolly, 373 So. 2d 855 (Ala. Civ. App. 1979).

The essential language in dispute is the meaning of "event or events" which would activate the jurisdiction of the Commission to hear a complaint. In construing a statute several rules of construction are applicable. The court is to ascertain and give effect to the legislature's intent as expressed from the words of the statute. State v. Steel City Crane Rental, Inc., 345 So. 2d 1371 (Ala. Civ. App. 1977). A reasonable construction is to be given as opposed to a repressive or inconvenient one. League of Women Voters v. Renfro, 292 Ala. 128, 290 So. 2d 167 (1974). A statute must be considered in its entirety, and every word in it should be made effectual where possible. Alabama State

Board of Health ex rel Baxley v. Chambers County, Alabama, 335 So. 2d 653 (1976). Morever, a statute susceptible to either of two opposing interpretations must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsman. Shapiro v. United States, 335 U.S. 1 (1948).

The legislative intent is to provide for the safe, responsible and reasonable reclamation of lands which have been surface mined. §9-16-32(a), Code 1975. The legislature has delineated several objectives of this legislation, one of which is to ensure the prompt reclamation of mined surfaces. §9-16-32(i)(3) Code of Alabama 1975.

Two different interpretations of the language "event or events" are offered by the parties, neither of which is

satisfactory. Commercial urges this court to construe the phrase as meaning a single act which would start the ninety day period running. Under Commercial's interpretation if reclamation has not commenced within six months of the date mining began, the ninety-day period for filing a complaint begins to run. To adopt Commercial's interpretation would be unreasonable when applied to continuing and repeated violations and an extended period of operation. See League of Women Voters v. Renfroe, 292 Ala. 128, 290 So. 2d 167 (1976).

The Commission, on the other hand, submits that the failure to reclaim the land is a continuing act which does not abate until the land is properly reclaimed and that a complaint is timely filed if done within ninety days of any day in

which the land or any part thereof remains unreclaimed. To adopt the Commission's interpretation would nullify and eliminate the limitation provision entirely. There would be a diminished incentive to press for early reclamation. There would be no end to the surety's obligation under the bond. To remove a time limit for enforcing reclamation is to encourage delay of reclamation.

While a mining operation is ongoing, the probability of reclamation is likely to be greater because of a present financial ability of the operator to finance reclamation. The incentive and the means to reclaim are likely to decline once the coal is removed and equipment moved to other and more profitable operations. A direct and tangible risk in the Commission's interpretation is

the longer the land lies unreclaimed, the greater the probability of soil erosion and increased expenses for the ultimate reclamation. To permit the authority of the Commission to hear a complaint to extend over an unlimited time is to unreasonably frustrate the legislative intent of prompt reclamation of land.

Section 9-16-39(g) states that contouring of all affected land is to be completed "within six months from the date of the completion of operations", unless prevented by an act of God or otherwise extended by the director for reasonable cause. The ninety-day period thereafter is a limitation on filing a complaint for failing to complete contouring. Thus, in order to give a reasonable interpretation to the statute and effectuate the legislative intent,

we interpret the statutory words "event or events" found in Section 9-61-51(a) as meaning that except for an act of God or extension by the director, the outer limitation for filing a complaint would be nine months after the completion of mining operations.

Though the record does not reveal the exact date mining operations ceased, it was stipulated that the Commission had been aware of Hendrix' failure to timely reclaim the land for as long as fourteen months before the complaint was filed. It was further stipulated that Hendrix was in violation of §9-17-39, for a period substantially in excess of ninety days prior to the filing of the complaint. It thus appears that a timely complaint was not filed. Therefore no jurisdiction existed in the Commission,

under the statute, to hear the complaint against Hendrix. The crucial question is whether Commercial, as surety, may claim the benefit of its principal's defense to the complaint before the Commission.

Under Alabama law, a surety may make any defense not personal to the principal, that the principal can. United States Fidelity & Guaranty Co. v. Town of Dothan, 174 Ala. 480, 56 So. 953 (1911). Specifically, a surety may assert as a defense the statute of limitations available to the principal, State v. Bi-States Construction Co., 269 N. W. 2d 455 (Iowa 1978), even if the principal through negligence, inadvertence, collusion, or otherwise, has not raised it. United States v. Frankini Construction Co., 139 F. Supp. 153 (D. Mass. 1956). See also, 72 C.J.S. Principal and Surety §255 (1951).

Thus, in this case, the surety, Commercial, could claim the benefit of Hendrix' defense of the lack of jurisdiction in the Commission to entertain the complaint against it.

We find the Commission erred in denying Commercial the right to appear and defend in place of its defaulting principal. The circuit court erred in entering judgment in favor of the Commission and by holding therein that failure to reclaim is a continuing violation with no limitation upon the filing of a complaint and hearing thereon by the Commission. For want of jurisdiction in the Commission, its orders herein are void and to no effect. Commercial is due to be discharged from its obligation as surety in the instances complained of.

In view of the issue of jurisdiction

being dispositive, we pretermit discussion of other issues presented.

REVERSED AND REMANDED WITH DIRECTION.

BRADLEY and HOLMES, JJ., Concur.

APPENDIX D

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

TUSCALOOSA COUNTY CIRCUIT COURT

RE: CIV 81-5074

RE: COMMERCIAL STANDARD INSURANCE COMPANY

VS.

ALABAMA SURFACE MINING RECLAMATION COMMISSION

APRIL 5, 1983

This cause coming on to be heard, on appeal from the Alabama Surface Mining Reclamation Commission (now the Alabama Surface Mining Commission), pursuant to §9-16-51, Code of Alabama 1975, and was submitted to the Court on the pleadings,

exhibits, stipulation of facts, and memorandum briefs of both parties.

The Court having considered the pleadings, exhibits, stipulation of facts, brief of the parties and the applicable law, makes the following findings and conclusions of law:

1. The Court finds and the Legislature of Alabama has declared, that it is the public policy of this State that all areas surface mined must be reclaimed and that lands subjected to coal surface mining and not reclaimed constitute a peril to the natural resources, economic well-being of the State and a hazard to the health and safety of the people of this State.

2. The Court finds that the provisions of the Alabama Surface Mining Reclamation Act of 1975, must be construed

so as to give effect to the aforesaid declaration of public policy and legislature intent.

3. The Court finds and holds that a failure to reclaim lands affected by coal surface mining is a violation of the Alabama Surface Mining Reclamation Act of 1975, and that this violation is continuous in nature, i.e., the violation exists until the land is reclaimed to the standards required by law. To hold otherwise would be to defeat the manifest intentions of the legislature.

4. The Court finds and holds that the verified complaints in this case were timely filed with the Defendant Commission and sufficient to invoke its jurisdiction to hold administrative hearings and enter appropriate orders to bring the mine operator into compliance with

the provisions of the Alabama Surface Mining Reclamation Act of 1975.

5. The Court finds and holds that there were no violations of due process in the hearings before the Defendant Commission or in the order of the Defendant Commission in declaring Plaintiff's surety bonds forfeited and payable into the Alabama Surface Mining Reclamation Fund.

6. The Court finds and holds that the orders of the Commission, requiring Plaintiff to either perform in its principal's place or to pay the funds due under its surety bond, although not a judicial determination of forfeiture, and of no force or effect as a judicial forfeiture, are sufficient demands on the surety to perform its obligations, and is reasonable and lawful under the cir-

cumstances presented, and supported by a clear preponderance of the evidence.

7. The Court finds and holds that Plaintiff is obligated unto the State of Alabama as per the terms of its surety agreement, and that Plaintiff may either perform in the place of its principal or pay the sums due under its bond.

8. The Court finds that the Plaintiff is not entitled to the relief prayed for.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED BY THE COURT:

1. The judgment be and is hereby entered in favor of the Defendant and against Plaintiff.

2. That the orders of the Alabama Surface Mining Reclamation Commission requiring Plaintiff to pay sums due under

bond are reasonable and lawful and supported by a clear preponderance of the evidence and Plaintiff is ordered to comply with the orders of the Commission.

3. That costs accrued herein be and are hereby taxed against Plaintiff, and if not paid let execution issue, and if execution is returned not found, then costs are taxed against Defendant.

4. That the Clerk shall cause a copy of this order to be delivered to the parties by placing a copy of same in the United States Mail, to the attorneys of record.

DONE and ORDERED, this the 5th day of April, 1983.

I, Doris T. Turner, Clerk, Circuit Court Registry Division, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said

Court.
Witness my hand this the 5th day of April, 1983.

/s/ Doris T. Turner
Clerk, Circuit Court of Tuscaloosa County, Alabama

APPENDIX E

BEFORE THE ALABAMA SURFACE

MINING RECLAMATION COMMISSION

MARCH 12, 1981

Frank Evans, Inspector
for the State of Alabama,

Complainant

v. No: F 81-030,
F 81-032,
Hendrix and Lee, Inc., F 81-033,
Eddie Hendrix, as Presi- F 81-034,
dent and Responsible Officer F 81-035
and John C. Coggins, III,
as Designated Agent for
Service,

Respondents

Pursuant to the provisions of the Alabama Surface Mining Reclamation Act of 1975, a public hearing in the above-styled cause was held on February 25, 1981, before the Honorable Virgil Willett, Director of the Commission and acting Hearing Examiner. The Commission was

represented by Marlin V. MacLaughlin, Jr., Assistant Attorney General. The Respondents were not represented though duly served and notified by Ronald J. F. Reeves, Assistant Attorney General, January 27, 1981. At that time, Mr. Eddie Hendrix was in the office of the Alabama Surface Mining Reclamation Commission and acknowledged that he had knowledge of the various Hendrix and Lee cases. At that time he further stated that he was attempting to work the problem of untimely reclamation out with the Receiver in Bankruptcy. Relying on the evidence as shown in the official transcript of this hearing, the Commission hereby FINDS:

It is noted that proper service of notice is verified, the Citation and Order with attached Verified Complaint

having been mailed and the Respondent, Eddie Hendrix, having been in the office of the Commission and acknowledged the Dockets before Ronald J. F. Reeves, Assistant Attorney General, January 27, 1981. The Respondent has failed to appear or be represented as ORDERED. A representative of the surety company, Commercial Standard Insurance Company, being, Thomas Stewart, Attorney, was present at the hearing. Relying on the allegations contained in the Citation and Order as represented by the attached Verified Complaint for which there is no dispute, namely, lack of timely reclamation and in consideration of the apparent Bankrupt status of Hendrix and Lee, Inc., on acreage disturbed or affected under Permit P-1899, P-1867, P-1898, P-2020, P-1753, the following ORDER is issued:

O R D E R

It is hereby ORDERED that Hendrix and Lee, Inc., or any other party with an interest, submit or cause to be submitted a reclamation timetable in writing acceptable to the Commission addressing the specific steps to be taken to completely reclaim the acreage affected under permits P-1899, P-1867, P-1898, P-2020, and P-1753, including grading, contouring, soil testing, the addition of appropriate soil amendments and seeding so that complete reclamation shall be accomplished by May 15, 1982, exclusive of the two (2) necessary growing seasons within which to establish permanent vegetative cover. Said reclamation timetable shall be due within sixty (60) days of the date of this ORDER. Failure to receive a satisfactory

reclamation timetable within sixty (60) days of the date of this ORDER as outlined above, the applicable bonds, be it a corporate surety bond or in the form of other securities, are deemed FORFEITED the sixty-first (61st) day following the date of this ORDER. However, where a corporate surety bond is involved, the surety may submit or cause to be submitted the required reclamation timetable in writing satisfactory to the Commission outlining the specific steps to be taken to achieve complete reclamation exclusive of the necessary two (2) growing seasons for the establishment of permanent vegetative cover, no later than May 31, 1982. Said surety shall have an additional thirty (30) days within which to submit the required reclamation timetable. Failure by Hendrix and Lee, Inc.,

any party in interest or the corporate surety to submit the required reclamation timetable within ninety (90) days of the date of this ORDER, the applicable bonds on permits P-1899, P-1867, P-1898, P-2020, P-1753 are immediately FORFEITED and the funds thereunder DUE and PAYABLE on the ninety-first (91st) day from the date of this ORDER into the Alabama Surface Mining Reclamation Fund for the reclamation of the affected acreage under Permits P-1899, P-1867, P-1898, P-2020, P-1753.

It is further ORDERED that based upon the Bankrupt status of Hendrix and Lee, Inc., and upon the presumed inability to perform the obligations under State Law and Regulations and due to the continued failure to comply with previous Notices of Violations and Orders of this Commission, the license of Hendrix and

Lee, Inc., being L-237, is immediately REVOKED.

ORDERED BY THE COMMISSION, this the 12th day of March, 1981.

ATTEST: A true copy

/s/ Virgil Willett
Virgil Willett,
Director for the
Commission

The above is a consolidation of the five administrative orders issued in the case. The orders are identical except for the reference to permit numbers and administrative docket numbers.

APPENDIX F

STATUTES INVOLVED

Ala. Code §9-16-31:

The following words and phrases, unless a different meaning is plainly required by the context, shall have the following meanings:... "Operator" means the person, firm, corporation, partnership or any other entity conducting coal surface mining.

Ala. Code §9-16-32(a):

The objective of this Act is to provide for the safe, responsible and reasonable reclamation of lands upon which surface disturbances will be created by surface mining of coal so as to protect the taxable value of property and preserve natural resources within the State and to protect and promote

the health and safety of the people of this State consistent with the protection of property and with maximum employment and the economic and industrial well-being of the State. The Legislature finds and declares that the extraction of coal by surface mining provides a major present and future source of energy and is an essential and necessary activity which contributes to the economic and material well-being of the State. Ala. Code §9-16-34(23)(a):

In addition to any other powers conferred on it by law, the Commission shall have the power to:.... Enforce the provisions of section 502 of the federal Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87) and Parts 700.5, 710.5, 710.11, 710.12, 715-718 of the Interim Surface Mining

Regulations promulgated thereunder, and any subsequent amendments or revisions to said regulations.

Ala. Code §9-16-39(g):

Regrading shall begin within six (6) months after the beginning of operations, unless such regrading is prevented by act of God such as unseasonable weather or labor disputes or unless otherwise extended by the Director for reasonable cause, provided however that in those operations where the mining method utilized would result in the placing of over-burden on regraded areas, such regrading shall be commenced as soon as practicable compatible with such mining method, provided further that the applicant shall complete the contouring of all affected land within six (6) months from the date of the completion of

operations, unless such regrading is prevented by act of God such as unseasonable weather or labor disputes or unless otherwise extended by the Director for reasonable cause.

Ala. Code §9-16-44(a), (b):

After a coal surface mining permit application has been approved but before such a permit is issued, the applicant shall file with the Commission, on a form prescribed and furnished by the Commission, a bond for performance payable to the State, and conditioned upon faithful performance of all the requirements of this Act and the coal surface mining permit. The bond shall cover the to be affected area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the

initial term of the permit. As succeeding increments of surface coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with the Commission an additional bond or bonds to cover such increments in accordance with this section. The amount of the bond required for each bonded area shall be One Thousand Two Hundred ($1,200.00) Dollars, per acre to be bonded, but in no case shall the bond be less than Ten Thousand ($10,000.00) Dollars per permit.

Liability under the bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's responsibility for revegetation requirements as provided in this Act. Upon successful revegetation and acceptance by

the Commission, the operator's responsibility shall completely terminate and the remaining portion of bond released.

Ala. Code §9-16-51(a):

Whenever a verified complaint is filed with the Commission, alleging that any operator is in violation of this Act, or rules and regulations of the Commission, the Commission may cause to have issued and served upon the person alleged to be committing such violation a written notice which shall specify the provision of this Act and/or the rules and regulations of the Commission which such operator allegedly is violating, and a statement of the manner in, and the extent to which said operator is alleged to violate this Act and/or the rules and regulations of the Commission, and shall require the person so complained against to answer

the charges of such formal complaint at a hearing before the Commission at a time not less than ten (10) days or more than thirty (30) days after the service of notice. At the request of the Commission or of the charged operator, the Director shall issue subpoenas requiring the attendance of witnesses and the production of such evidence as may be relevant to such hearing. The charged operator may appear in person or by counsel at such hearing. Testimony shall be taken under oath and recorded stenographically at such hearing and the charged operator shall have the right to cross-examine witnesses at such hearing. A copy of the record of such hearing shall be furnished to the charged operator upon payment of the cost of such copy. The Commission shall enter such order as

it deems appropriate on the basis of the facts presented, which order may include a civil penalty of not more than $10,000 based on the severity of the offense or offenses found in such order. The Commission shall forthwith mail a copy thereof to the charged operator or its attorney of record. If such order of the Commission is not complied with, the Commission may commence proceedings under Section 17 of this Act. The filing of a verified complaint alleging a violation of this Act, or rules or regulations of the Commission, shall be deemed to include all identical occurences of the offense alleged and no further complaint relating to such offense may be filed pending the final resolution of such complaint pursuant to this section. Complaints alleging a violation of the

Act, rules or regulations of the Commission must as a jurisdictional matter be filed within ninety (90) days of the event or events giving rise to such complaint. 28 U.S.C. §1257 (3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:..... By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

30 U.S.C. §1201:

The Congress finds and declares that ----

(a) extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;

(b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

(c) many surface mining operations

result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property (,) by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appro-

priate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public;

(e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations;

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing

regulations for surface mining and reclamation operations subject to this Act should rest with the States;

(g) surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders;

(h) there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal [mining operations] on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and

adjoining areas as well as continuing to impair environmental quality;

(i) while there is a need to regulate surface mining operations for minerals other than coal, more data and analyses are needed to serve as a basis for effective and reasonable regulation of such operations;

(j) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner; and

(k) the cooperative effort established by this Act is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.

30 U.S.C. §1202:

It is the purpose of this Act to --

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;

(c) assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible;

(d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with

the surface coal mining operations;

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;

(g) assist the States in developing and implementing a program to achieve the purposes of this Act;

(h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act [enacted Aug. 3, 1977] and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public;

(i) assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act;

(j) provide a means for development of the data and analyses necessary to establish effective and reasonable regulation of surface mining operations for other minerals;

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

(l) stimulate, sponsor, provide for and/or supplement present programs for the conduct of research investigations, experiments, and demonstrations,

in the exploration, extraction, processing, development, and production of minerals and the training of mineral engineers and scientists in the field of mining, minerals resources, and technology, and the establishment of an appropriate research and training center in various States; and

(m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

30 U.S.C. §1253:

Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as

provided in sections 521 and 523 and title IV of this Act [30 USCS §§1271, 1273 and 1231 et seq.], shall submit to the Secretary, by the end of the eighteenth-month period beginning on the date of enactment of this Act [enacted Aug. 3, 1977], a State program which demonstrates that such State has the capability of carrying out the provisions of this Act and meeting its purposes through ---

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the minimum requirements of this Act,

including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act;

(4) a State law which provides for the effective implementations [implementation], maintenance, and enforcement of a permit system, meeting the requirements of this title for the regulations [regulation] of surface coal mining and reclamation operations for coal on lands with-

in the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 [30 USCS §1272] provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; and

(6) establishment for the purpose of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.

(b) Approval; prerequisites. The

Secretary shall not approve any State program submitted under this section until he has ---

(1) solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed State program;

(2) obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151-1175), and the Clean Air Act, as amended (42 U.S.C. 1857 et seq.);

(3) held at least one public hearing on the State program within the State; and

(4) found that the State has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards.

The Secretary shall approve or disapprove a State program, in whole or in part, within six full calendar months after the date such State program was submitted to him.

(c) Notice of disapproval. If the Secretary disapproves any proposed State program in whole or in part, he shall notify the State in writing of his decision and set forth in detail the reasons therefor. The State shall have sixty days in which to resubmit a revised State program or portion thereof. The

Secretary shall approve or disapprove the resubmitted State program or portion thereof within sixty days from the date of resubmission.

(d) Inability of State to take action because of injunction. For the purposes of this section and section 504 [30 USCS §1254], the inability of a State to take any action the purpose of which is to prepare, submit or enforce a State program, or any portion thereof, because the action is enjoined by the issuance of an injunction by any court of competent jurisdiction shall not result in a loss of eligibility for financial assistance under titles IV and VII of this Act [30 U.S.C.S §§1231 et se. 1251 et seq.] or in the imposition of a Federal program. Regulation of the surface coal mining and reclamation operations covered

or to be covered by the State program subject to the injunction shall be conducted by the State pursuant to section 502 of this Act [30 USCS §1252], until such time as the injunction terminates or for one year, whichever is shorter, at which time the requirements of sections 503 and 504 [30 USCS §§1253, 1254] shall again be fully applicable.

30 U.S.C. §1255(a):

No state law or regulation in effect on the date of enactment of this Act [Aug. 3, 1977], or which may become effective thereafter, shall be superseded by any provision of this Act of any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

30 U.S.C. §1269(c)(3):

When the operator has completed successfully all surface coal mining and reclamation activities, the release of the remaining portion of the bond, but not before the expiration of the period specified for operator responsibility in section 515 (§1265), provided, however: that no bond shall be fully released until all reclamation requirements of this Act are fully met.

30 U.S.C. §1271(d):

As a condition of approval of any State program submitted pursuant to section 503 of this Act [30 USCS §1253], the enforcement provisions thereof shall, at a minimum, incorporate sanctions no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements rela-

ting thereto. Nothing herein shall be construed so as to eliminate any additional enforcement rights or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.

Supreme Court, U.S.
FILED
MAY 18 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1717

In The
Supreme Court of the United States
October Term, 1983

ALABAMA SURFACE MINING RECLAMATION COMMISSION,

Petitioner,

v.

COMMERCIAL STANDARD INSURANCE COMPANY,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO ALABAMA SUPREME COURT

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PARENT COMPANIES AND AFFILIATES

As of the date of this filing, Commercial Standard Insurance Company is a wholly-owned subsidiary of F.W.T. Corporation. F.W.T. Corporation is a wholly-owned subsidiary of Western Preferred Corporation. Early American Insurance Company, Western Preferred Casualty Company, and The Standard Fire Insurance Company of Alabama are wholly-owned subsidiaries of either F.W.T. Corporation or Western Preferred Corporation.

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ALABAMA SURFACE MINING RECLAMATION COMMISSION,

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STATEMENT OF FACTS

The following statement of facts is taken from the Stipulation of Facts agreed to by the parties herein and filed in the Circuit Court of Tuscaloosa County as the factual record upon which the decisions in this case are based.

1. That the Plaintiff has heretofore issued certain surface mining reclamation bonds on behalf of Hendrix & Lee, Inc., a company formerly engaged in the business of surface mining for coal, pursuant to the Surface Mining and Reclamation Laws of the State of Alabama.

2. That the Defendant is an agency of the State of Alabama whose responsibility as defined in the Alabama Surface Mining Reclamation Act of 1975, is generally to regulate the business of surface mining for coal in the State of Alabama and to enforce the Surface Mining Reclamation Laws of the State of Alabama.

3. That Hendrix & Lee, Inc. is a corporation now in bankruptcy which was formerly engaged in the business of surface mining of coal in the State of Alabama.

4. That the Defendant, by and through its agents, Frank Evans and Bob Cleere, has heretofore on or about the 12th day of January, 1981, caused certain verified complaints to issue against Hendrix & Lee, Inc. alleging certain violations of the Alabama Surface Mining Reclamation Act of 1975.

5. That on or about January 27, 1981, a hearing was held in the offices of the Defendant concerning the verified complaints heretofore filed by Frank Evans and Bob Cleere, as agents of the Alabama Surface Mining Reclamation Commission.

6. That Hendrix & Lee, Inc., though duly served and notified as to the date, time and place of the hearing, failed to appear and the Commission issued an order in each of the five various cases filed by the Commission against Hendrix & Lee, Inc., finding that Hendrix & Lee, Inc., was in violation of certain parts of the Ala-

bama Surface Mining Reclamation Act of 1975, to-wit: failure to reclaim affected lands in accordance with state law, in violation of Section 9-16-39, *Code of Alabama*, 1975, and it was further ordered by the Commission that the surety bonds outstanding on the various tracts of property surface mined by Hendrix & Lee, Inc. and covered under the various cases would be forfeited and rendered due and payable to the State of Alabama.

7. That the Plaintiff was not made a party to the said action but was given notice of the existence of the action and of the time and place of the hearing and was represented by counsel at said hearing.

8. That neither the Plaintiff (Commercial Standard) nor Plaintiff's counsel was allowed to participate in the hearing by the hearing examiner, who was also the Director of the Defendant, Alabama Surface Mining Reclamation Commission, and that even though the Plaintiff specifically requested that it be allowed to present evidence, cross examine witnesses, and subpoena evidence, all such requests were denied. Plaintiff's counsel specifically objected, on the record, that the actions of the hearing examiner denied the Plaintiff the Constitutional right to due process and equal protection of the law and that any orders issued by the Commission would also violate the due process and equal protection rights of the Plaintiff.

9. That Section 9-16-51, *Code of Alabama*, 1975, requires that a verified complaint alleging a violation of the Surface Mining Reclamation Act of 1975, must be filed within ninety (90) days of the event or events giving rise to the said complaint, and further the Code states that this is a jurisdictional matter.

10. That the Defendant (Commission) was aware of Hendrix & Lee, Inc.'s failure to reclaim the land as required prior to the issuance of the citation and order and had been aware of such for a considerable amount of time. In fact, the Defendant had been aware of Hendrix & Lee, Inc.'s illegal failure to timely reclaim the land for as much as fourteen (14) months.

11. That Virgil Willett, Director of the Defendant, Alabama Surface Mining Reclamation Commission, and also the individual who acted as hearing examiner in this case for the Defendant, Alabama Surface Mining Reclamation Commission, alleges to have had some oral communication with representatives of Hendrix & Lee, Inc. concerning their lack of timely reclamation prior to the issuance of the veried complaint by the inspectors.

12. The Defendant (Commission) had no formal policies concerning the manner of inspection by its inspectors. It did, however, have an informal policy that all inspectors were aware of and which they understood they were to follow, which was to inspect each pit on a monthly basis. This policy was not followed in regard to the pits which are subject to the bonds in question.

13. Section 9-16-39(b), Code of Alabama, 1975, specifically requires that "regrading shall begin within six (6) months after the beginning of operations unless such regrading is prevented by act of God, such as unseasonable weather or labor disputes or unless otherwise extended by the Director for reasonable cause; . . . provided further that the applicant shall complete the contouring of all affected land within six (6) months from the date of the completion of operations, unless such regrading is prevented

by act of God, such as unseasonable weather or labor disputes or unless otherwise extended by the Director for reasonable cause."

14. Regrading did not commence on a portion of the properties within the time required by Section 9-16-39 and was not completed on any of the subject property within the time required by Section 9-16-39 of the Code of Alabama.

15. The Defendant (Commission) had actual knowledge for a period of time substantially in excess of ninety (90) days prior to the filing of the verified complaint in this case that Hendrix & Lee, Inc. had failed to reclaim their disturbed surface mining areas in violation of the Alabama Surface Mining Reclamation Act.

16. The Alabama Surface Mining Reclamation Commission files reflect no communications whatever with Hendrix & Lee, Inc. concerning reasonable cause for extending the period of time as set out in the Act within which regrading must be commenced or completed prior to the filing of the verified complaint in these cases.

17. The Alabama Surface Mining Reclamation Commission files do reflect that various "notices of violation" were sent to Hendrix & Lee, Inc. concerning their illegal failure to reclaim and other illegal acts. The files further reflect that no efforts to abate these notices concerning the failure to properly reclaim the land were ever made by Hendrix & Lee, Inc.

18. That while some effort was made to reclaim some portion of the pits in question, the most that was done on any one pit was approximately 60% of the total effort required to properly reclaim the land, and further, that on

much of the surface mining area in question no reclamation whatever was ever done by Hendrix & Lee, Inc.

19. That, if the ninety (90) day jurisdictional time period for filing a verified complaint against Hendrix & Lee, Inc. for its reclamation violations found in Section 9-16-51 applies in this case, then the ninety (90) day period had expired long before the verified complaints were filed.

ARGUMENT

A. No federal question was raised by petitioner or decided against petitioner in the state courts below.

The Alabama Surface Mining Reclamation Commission (hereinafter "Commission") alleges that this Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1257(3), which allows review of a final decision rendered by the highest court of the state where the validity of a statute of the United States is drawn into question or some special right is set up or claimed under a statute of the United States. In fact this case has absolutely nothing to do with federal law, and the Petition filed by the Commission is misleading in regard to the issues in this case.

Commercial Standard Insurance Company (hereinafter "Commercial Standard") emphasizes that the very first time that the federal questions discussed in the petition have ever been mentioned by the Commission is in the petition which was filed with this Court on April 21, 1984. Nowhere in the Petition for Writ of Certiorari

before this Court does the Commission point to any place in the record where any of these federal questions were raised in any of the lower courts. (Note the Sup. Ct. R. 21(1) (h)) The reason for this is that these questions were not raised at any point in the proceedings below and for this reason alone the petition should be denied. *Maxwell v. Newbold* (1856), 59 U.S. 511, 15 L.Ed. 506; *Hoyt v. Shelden* (1862), 66 U.S. 518, 17 L.Ed. 65; *Lynde v. Lynde* (1901) 181 U.S. 183, 45 L.Ed. 810, 21 S.Ct. 555.

Rule 17 of the Rules of the Supreme Court very clearly indicates that a Petition for a Writ of Certiorari to a state court of last resort is to be granted only when there are special and important reasons therefor. The guidelines set out in Rule 17 indicate that a Petition is to be granted when a state court has decided a federal question in conflict with other state courts of last resort or a federal court of appeals, or where a state court has decided an important question of federal law which either has not been settled by this Court or has decided such question in conflict with decisions of this Court.

It is obvious that a Petition for a Writ of Certiorari is designed only to allow for the review by this Court of decisions rendered by state courts of last resort of substantial and important questions of federal law. Certainly it was never intended to provide for review by this Court of a decision by a state court dealing strictly with matters of statutory construction of the Code of that particular state. This case is involved purely and simply with such a question of statutory construction.

No questions of federal law have been decided by the Alabama Courts because no such questions have been

raised. The only federal questions ever raised in this case are the federal constitutional questions raised by Commercial Standard, and these questions are not addressed by the Alabama Courts because the ruling on the state law question fully resolved the case.

The history of this case is that it has been heard and decided by the Commission itself, then by the Circuit Court for Tuscaloosa County, Alabama, the Alabama Court of Civil Appeals, and then a Petition for a Writ of Certiorari was filed with, and denied, by the Alabama Supreme Court. The Commission has filed a Brief in each of these Courts in support of its position, and not one time in any of the Alabama state courts has the Commission argued that any federal questions are involved in this case.

Until now the Commission has argued nothing to the Alabama Courts other than state law, state policy and state statutory construction. No state court has ever issued any ruling, decision or opinion on any federal question in this case, because none are present.

B. This case is concerned solely with the interpretation of statutory law found in the Alabama Code and no valid question of federal law is involved.

None of the "federal questions" argued by the Commission in its petition have been argued at any earlier point in this case because these arguments are spurious and have nothing to do with this case. The only real issues in this case arise out of state law and the lower

court decided these issues correctly and consistently with the past precedents of the Alabama courts.

The Commission argues that the basic problem with the lower court decision is that it too restrictively interprets a state statute which "draws its authority from the federal act". (Petition for Writ of Certiorari page 8.) They argue that § 9-16-51(a) of the *Code of Alabama* was implemented by the Alabama legislature in order to "carry out the purposes of the federal act", i.e., the rights and remedies created by the Federal Surface Mining Control and Reclamation Act of 1977. This simply is not true. The Alabama act was passed in 1975, two years prior to the passage of the federal act. The Alabama Surface Mining Reclamation Act of 1975 pre-dates the federal act, and has in fact now been replaced by the present Alabama law codified at 9-16-70 et seq. of the *Code of Alabama,* which *was* implemented in order to carry out the purposes of the Federal law.

When the Federal Surface Mining Control and Reclamation Act became law in 1977, the Alabama legislature responded by enacting the Alabama Surface Mining Control and Reclamation Act of 1981 which repealed the Surface Mining Act of 1975. The present case was decided under the 1975 Act which was not enacted in response to any federally created rights and was in fact repealed and replaced in response to the federal law. To argue as the Commission does that "the purpose of the Alabama Act is to safeguard these federal rights" (Petition for Writ of Certiorari p. 15) when in fact the federal rights were not even in existence when the Alabama Act was passed, is erroneous and misleading.

The fact is that the Alabama Surface Mining Reclamation Act of 1975 created certain rights and obligations on the part of surface coal mining companies. It further created the Commission and gave it the power, authority and duty to enforce the rights and obligations created by the law. It contained procedures to be followed in enforcing the law and it contained a provision that

> "complaints alleging a violation of the act, rules or regulations of the Commission must as a jurisdictional matter be filed within 90 days of the event or events giving rise to the complaint." § 9-16-51 *Code of Alabama*, 1975.

In the instant case Hendrix & Lee, Inc., a surface mining company, mined property pursuant to permits granted to it by the Commission. The company was obligated to reclaim the property pursuant to the law, and the Commission was charged with the responsibility and duty of enforcing this obligation. The company made very little effort to reclaim the land. The Commission, rather than proceeding to enforce the law as it was charged by the legislature with the responsibility of doing, did nothing until some 14 months after the coal company had abandoned the property. Finally, after the company filed for bankruptcy, the Commission initiated a complaint procedure under § 9-16-51 of the *Code of Alabama*, in an effort to force Commercial Standard to either reclaim the property or forfeit the face value of the bonds. Commercial Standards' only involvement is as surety on performance bonds posted by Hendrix & Lee, Inc. pursuant to the Alabama law.

The essence of this case is whether under Alabama State law the Commission has lost jurisdiction under § 9-16-51 of the Alabama Code to enforce the obli-

gation of the coal company to reclaim the property. The Alabama Courts correctly held that the Alabama law means what it says, and that the failure of the Commission to bring a timely complaint results in a lack of jurisdiction in the Commission to enforce the company's obligation. *Alabama Surface Mining Reclamation Commission v. Jolly*, 373 So.2d 855 (Ala. Civ. App. 1979). The Commission has no authority to hear complaints filed out of time. The effect of this is the release of the obligation of the coal company.

The only other question in the case is whether under Alabama law the release of the principal obligor also releases the surety. The Court correctly answered this question in the affirmative. Again, no federal question is involved and the Commission merely applied the black letter law governing the relationship between a principal and a surety.

The Commission argues that the decision of the Alabama court is so "restrictive" as to somehow offend federal law. The Commission argues that the effect of the decision is that the land will remain unreclaimed and the Commission blames this result on the courts. The blame for the result in this case in fact lies squarely with the Commission itself. Neither the Alabama law nor the decision of the Alabama court is overly restrictive. The Commission had ample opportunity to prevent this result from occurring had it utilized the broad range of powers given it to enforce the state reclamation laws. The Commission abrogated its responsibility and now seeks to place the blame elsewhere by mischaracterizing the true issues in this case and the true basis for the lower court's opinion. Indicative of this is the fact that the Commission never argued that any federal question was present in this case until it became necessary to make that argument in order

to assert jurisdiction in this Court. This Court should take jurisdiction only when a real and not fictitious federal question is present. *Caldwell v. Texas* (1891), 137 U.S. 692, 34 L.Ed. 816, 11 S.Ct. 224.

It cannot be over-emphasized that the statute which is the basis for the decision in this case has been repealed and no longer has anything to do with complaints arising against coal companies mining pursuant to the present Alabama law.

> "In resolving the jurisdictional issue it should be noted that the Alabama Surface Mining Reclamation Act of 1975 has been repealed by Act No. 81-435 Acts of Alabama 1981, § 38. The 1975 Act is applicable in this case, however, because it was in effect at the time the cause of action occurred." *Commercial Standard Insurance Co. v. Alabama Surface Mining Reclamation Commission*, 443 So.2d 1245, 1247 (Ala. Civ. App. 1983). Appendix to the Petition for Writ of Certiorari, p. 7a.

The present law contains no 90-day jurisdictional statute of limitations, as did the 1975 law. No matter how stringent or restrictive the law is as written by the legislature, if it is not zealously enforced by the agency created and empowered to enforce it, then its provisions will be ignored. This is what happened under the 1975 Act in Alabama. The Commission ignored its mandate from the Alabama legislature which was to see that surface mined areas were promptly reclaimed by the mining companies who reaped the profits from the land. The agency did nothing in this case to force Hendrix and Lee, Inc. to properly reclaim the property as it was required to do by Alabama law. Had the Commission done its job, this result would not have occurred, and this case would never have happened. The fact that it did not properly enforce the law

does not, however, amount to a federal question so as to allow this Court to entertain jurisdiction.

CONCLUSION

For the reasons stated above, this Petition should be denied.

Respectfully submitted,

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